IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-6525

SAMUEL HALL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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For the reasons set forth above, Certiorari should be granted.

APPENDIX

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Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Ohio entered in the above captioned case on December 23, 1976, imposing upon Petitioner a sentence of death in the electric chair, which is repugnant to and violative of the Eighth and Fourteenth Amendments of the Constitution of the United States.

OPINION BELOW

The Opinion of the Supreme Court of Ohio is reported at 48 Ohio St. 2d 325, 358 N.E. 2d 590, and printed herein as Appendix A. The Order of the Supreme Court of Ohio denying rehearing, issued January 14, 1977, is

printed herein as Appendix B. The Order of the Supreme Court of Ohio Staying Execution of Sentence is printed herein as Appendix C. The Opinion of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, is unreported as is printed herein as Appendix D. The Findings After Court Trial is printed herein as Appendix E. The Sentence of the trial court is printed herein as Appendix F. The indictment alleging the criminal offense of Aggravated Murder, which instituted the Criminal Process, is printed herein as Appendix G.

JURISDICTION

The judgment of the Hamilton County, Ohio, Court of Common Pleas, was entered against Petitioner Hall on January 20, 1975, convicting Petitioner of Aggravated Murder, in violation of Revised Code of Ohio, Section 2903.01. The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the conviction of Petitioner Hall on April 8, 1976, holding that the Ohio Death Penalty Scheme is not unconstitutional.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 and 2101 and Part V of the Rules of this Court.

The Petitioner has asserted below and is asserting here a deprivation of constitutional rights provided for in the Constitution of the United States.

QUESTIONS PRESENTED

The constitutional questions to be presented by this Writ of Certiorari were presented to the Hamilton County Court of Common Pleas by written pre-trial motions to dismiss, which issues were preserved at each appropriate stage, during Appellate Review and before the Supreme Court of Ohio, and those questions are:

I. Whether Ohio's statutory framework for the imposition of Capital Punishment (Revised Code, Sections 2929.03 and 2929.24) is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution.

II. Whether Ohio's statutory scheme of capital punishment (Revised Code, Sections 2929.03 and 2929.04) is constitutionally defective because the mitigation provisions, which are vague and meaningless, do not provide for a particularized consideration of the relevant aspects of each defendant's character and record.

III. Whether Ohio's statutory provisions under which the defendant, in order to reduce his punishment, has the burden of proving the presence of mitigating factors by expensive testimony violates the due process and equal protection clauses of the Constitution of the United States.

IV. Whether Ohio's absence of a system of appellate review of all death sentences, which includes an actual and complete comparison of case by case facts to insure that a death sentence in a particular case is warranted, is violative of the Eighth Amendment and the Fourteenth Amendment of the United States Constitution.

V. Whether Ohio's statutory framework for imposing the death penalty is unconstitutional because it discourages a jury trial in the guilt phase and completely eliminates a jury from the sentence phase of the trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Eighth Amendment of the Constitution of the United States and Sections 2929.03 2929.04, 2903.03 and 2903.04, Revised Code of Ohio are set forth in Appendix H herein.

STATEMENT OF THE CASE

On October 16, 1974, Julius Graber was reported missing by his wife. Mr. Graber had just let his wife off at the front door of their apartment building before he proceeded to park his car in an adjacent lot. When he did not immediately return, Mrs. Graber called the Cincinnati Police Department. Later that same evening, the body of Julius Graber was found in a Cincinnati cemetery. He had been mortally wounded by a shotgun blast to the head.

Samuel Hall was jointly indicted with aggravated murder with specifications of aggravation. Pre-trial motions to dismiss on the grounds that the death penalty was unconstitutional were filed, argued and denied. Petitioner waived a jury and elected to be tried by a three judge panel. Petitioner was found guilty by a judgment entered on January 20, 1975. Pre-sentence investigation and report and psychiatric examinations were ordered and following a finding of no mitigation, Petitioner was sentenced to die in the electric chair.

The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the lower Court by decision, rejecting Petitioner's claim that the Ohio Death Penalty is repugnant to the Constitution. (Appendix D).

On December 23, 1976, the Supreme Court of Ohio entered its opinion concluding that Ohio's statutory frame-

work for the imposition of capital punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the Constitution of the United States. (Appendix A).

REASONS FOR GRANTING WRIT

This Court should grant certiorari because this case involves important constitutional questions presented as a result of Ohio's new statutory framework regarding aggravated murder and capital punishment. The Constitutionality of the current statutes have not been decided upon by this Supreme Court of the United States. Therefore, this Court should grant certiorari to consider whether the imposition and carrying out of the death penalty in Ohio violates the Eighth and Fourteenth Amendments of the Constitution of the United States.

The pertinent statutes are vague, meaningless, and prevent consideration of the relevant aspects of each defendant's character and record. Ohio's law unconstitutionally places on the defendant by an extremely expensive process the burden of proving mitigation. Also, Ohio's death penalty statute does not contain adequate provisions for appellate review. Furthermore, these statutes constitute an unconstitutional deprivation of the defendant's right to trial by jury at both the guilt and penalty stages of Ohio's bifurcated process.

I

WHETHER OHIO'S STATUTORY FRAMEWORK FOR THE IMPOSITION OF CAPITAL PUNISHMENT (REVISED CODE SECTIONS 2929.03 AND 2929.04) IS CONSTITUTIONAL AND DOES NOT IMPOSE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The rigid, regressive and harsh features of the Ohio Death Penalty Statutes are equal to those found constitutionally defective in *Woodson* v. *North Carolina,* 96 S.Ct. 2978, and *Roberts* v. *Louisiana,* 96 S.Ct. 3001. These statutes do not permit particularized consideration of the relevant aspects of the character and record of each convicted Defendant required by this Court. Rather, they concentrate upon and limit attention to certain aspects of the alleged criminal conduct for resolution of the live or die decision. Ohio Defendants are now sentenced to die by a process of arbitrary selection that does not differ in any constitutionally significant respect from the selection-election process in vogue immediately prior to *Furman* v. *Georgia,* 408 U.S. 238. No consideration is given to nor mention made of the how or why Petitioner Hall differed significantly or otherwise with any other condemned Defendant. The highest standards of accuracy and reliability are now required to insure that execution is the proper punishment in the cause under consideration. The Ohio Statutes permit and tolerate inaccuracies and allow unreliabilities as are hereinafter demonstrated.

II

WHETHER OHIO'S STATUTORY SCHEME OF CAPITAL PUNISHMENT (REVISED CODE SECTIONS 2929.03 AND 2929.04) IS CONSTITUTIONALLY DEFECTIVE BECAUSE THE MITIGATION PROVISIONS, WHICH ARE VAGUE AND MEANINGLESS, DO NOT PROVIDE FOR A PARTICULARIZED CONSIDERATION OF THE RELEVANT ASPECTS OF EACH DEFENDANT'S CHARACTER AND RECORD.

Since Ohio includes no mitigating factors that look exclusively to the propensities and redeemability of the individual offender, the Ohio statute precludes the independent "consideration of the character and record of the individual" that is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina,* 44 U.S.L.W. at 5275. (96 S.Ct. 2978).

While Ohio's statute includes the right words (history, character and condition of the offender) the application of the evidence relating thereto is limited to the three enumerated mitigating circumstances:

Ohio Revised Code, Section 2929.04 (B)

> (B) Regardless of whether one or more of the aggravated circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The first mitigating circumstance is probably limited to mercy killing, since it presumes a willing victim. While such a provision is nice to have around, mercy killing charged as aggravated murder is statistically rare. Moreover, this section concentrates on the propensities of the victim rather than on the character and record of the defendant.

If the second mitigating factor were present, one has to conclude that it probably would constitute a defense to aggravated murder sufficient to reduce the crime to manslaughter. (Appendix H).

The third mitigating factor consists of two parts:

1. the presence of a psychosis or mental deficiency,
2. proof that the offense was primarily a product of that psychosis or mental deficiency.

Psychosis and mental deficiency are included in mental disease or defect, which reach and cover exculpation, not mitigation, in Ohio. In *State* v. *Staten,* 18 Ohio St. 2d 13, the Ohio Supreme Court announced its current rule regarding the defense of insanity:

> One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct as a result of mental disease or defect, he does not

> have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

It is impossible to distinguish the difference between the defense of insanity and the mitigating circumstances.

The phrase "mental deficiency" is not defined by the Ohio statute. Nor is it adequately defined by the psychiatric community. In fact, the term is no longer used by the *Diagnostic and Statistical Manual of Mental Disorders,* published by the American Psychiatric Association. Those conditions previously referred to as "mental deficiency" are now termed "mental retardation".

The words of the statute clearly limit the mitigating circumstances to a psychosis or mental deficiency. However, since the trial of this case, the Ohio Supreme Court has broadened the definition:

> It is clear that the General Assembly chose the emphasized language to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus broadly defined and however evidenced, *any mental state or incapacity may be considered* in light of all the circumstances and including the nature of the crime itself so that it may be determined whether the condition found to have existed was the primary producing cause of the offense. To define terms such as those used in the statute is to narrow them. (Emphasis added.) *State* v. *Black,* 48 Ohio St. 2d at 268.

How could we have predicted that "psychosis or mental deficiency" really meant "any mental state or incapacity"? It certainly must be considered whether or not Ohio's trial

judges used a much narrower definition than that eventually given by the Ohio Supreme Court. It certainly should be questioned whether the provision is so vague and without definition as to be meaningless. Moreover, there is no possibility under Ohio's law for mitigation because of good character, previous lack of criminal record, or the likelihood or unlikelihood of future criminal behavior.

In short, Ohio has drafted a mitigation provision which includes two statistically nonexistant situations and a defense of insanity. What is left is tantamount to a mandatory sentencing statute.

III

WHETHER OHIO'S STATUTORY PROVISIONS UNDER WHICH THE DEFENDANT, IN ORDER TO REDUCE HIS PUNISHMENT, HAS THE BURDEN OF PROVING THE PRESENCE OF MITIGATING FACTORS BY EXPENSIVE TESTIMONY VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES.

While Ohio's mitigation provisions do not specifically say the defendant has the burden of proving mitigation, neither does it mandate that the state has the burden of proving the absence thereof. The result of this poorly drafted statute is to place the burden on the defendant. Does one realistically expect the prosecution to prove mitigation after he has indicted in such a way as to kill the defendant?

Ohio's mitigation provision cannot be distinguished from the legal situation presented to this Court in *Mullaney* v. *Wilbur,* 421 U.S. 684. The issue in *Mullaney* was a Maine homicide statute under which the defendant was given the burden of reducing his punishment by proving he acted in the heat of passion or under sudden provocation. This Court unanimously rejected such a notion. We in Ohio are given the burden of proving psychosis or mental deficiency in order to reduce a death sentence to a life sentence, an even greater potential difference in punishment than was presented in *Mullaney.* The important issue presented is whether Ohio's mitigation procedure violates due process of law.

Moreover, Ohio's so called mitigation provisions violate the equal protection concept of the Fourteenth Amendment. As a practical matter, it is necessary to hire the

needed testimony from experts such as psychiatrists and psychologists in order to show psychosis or mental deficiency. How does the indigent prove such a mitigation? Under Ohio's law, the poor cannot even rely on their good character because there is no provision for mitigation because of good character or lack of a criminal record. As we pointed out under Issue II, there is only one possible mitigation provision because the first two enumerated will probably never be used. Therefore, the only method of avoiding the death chair is to show that the crime was primarily a product of a psychosis or mental deficiency. No one can realistically say that good, experienced and competent psychiatric testimony is not expensive. The indigent defendant cannot afford the mitigation hearing in the State of Ohio.

IV

WHETHER OHIO'S ABSENCE OF A SYSTEM OF APPELLATE REVIEW OF ALL DEATH SENTENCES, WHICH INCLUDES AN ACTUAL AND COMPLETE COMPARISON OF CASE BY CASE FACTS TO INSURE THAT A DEATH SENTENCE IN A PARTICULAR CASE IS WARRANTED, IS VIOLATIVE OF THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In *Proffit* v. *Florida,* 96 S.Ct. 2967, the facts reflected that the Florida Supreme Court had set aside the death sentence in 40% of the cases it considered (pp. 2967-70). To date, the Ohio Supreme Court has affirmed seventeen of the eighteen death sentences, reversing one conviction only for evidentiary error unrelated to sentence. As far as Petitioner can ascertain, Ohio has not compared any one death case with any other death case, and has announced no rule or procedure for obtaining information about cases in which the Trial Judge found that mitigating circumstances existed and the death penalty not imposed. In the first death penalty case to reach the Ohio Supreme Court, *State* v. *Bayless,* 48 Ohio St. 73, the Ohio Court held that it had the power to review death sentences. However, the question is whether the Ohio Court is adequately reviewing death sentences by comparing each with any other death sentence to insure that it is proportionate to the sentence imposed in similar cases.

In *Gregg* v. *Georgia,* 96 S.Ct. 2909, this Court approved of an appellate procedure whereby the Georgia Supreme Court was required to include in its decision reference to similar cases that it has considered. Similar procedures were approved in Florida and Texas.

However, such procedure would be impossible under Ohio statutes. Certain aspects of the sentence stage are not even included in the appellate record, for example, the pre-sentence report provided for under O.R.C. 2929.03. Moreover, whatever such report may contain, only the substance which relates to one of the three listed mitigating circumstances may be considered by the trial court. In short, Ohio's appellate procedures cannot and does not compare either the facts or the defendants to see if we are achieving "even handed" justice before imposing the death sentence.

V

WHETHER OHIO'S STATUTORY FRAMEWORK FOR IMPOSING THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT DISCOURAGES A JURY TRIAL IN THE GUILT PHASE AND COMPLETELY ELIMINATES A JURY FROM THE SENTENCE PHASE OF THE TRIAL.

Ohio's death penalty/murder statute is an unconstitutional discouragement to a jury trial. Under 2929.03 (C) (1) (2) and (E), Ohio Revised Code, if the defendant exercises his right to a jury, a single judge decides whether the penalty is life or death. If the defendant waives a jury, electing to be tried by a three judge panel, his penalty will be decided by a three judge panel. However, all three judges must concur before the death penalty is imposed.

Therefore, if there is a single judge, the defendant, to escape the death penalty, must convince 100% of the trier of fact at the penalty trial. But if a jury is waived, the defendant need convince only 33 one-third % of the trier of fact at the penalty trial in order to avoid death.

This Ohio statute imposes an "impermissible burden upon the exercise of a constitutional right" to a jury trial. (*Jackson* v. *United States,* 390 U.S. 570.) At issue in the *Jackson* case was a federal statute which provided for the death penalty after a jury trial but no such penalty after a guilty plea or a trial to the Court.

In declaring such a statute unconstitutional, this Supreme Court of the United States stated:

> If the provision had no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. (Jackson, p. 572).

Furthermore, regardless of whether or not the defendant chooses a jury at the guilt phase, there is no provision for a jury at the penalty phase. This exclusion of a jury's vote from the sentencing process deprives a defendant of the right to have society itself voice its feelings concerning his acts and his penalty. Juries can and should make the kind of findings set forth in Ohio's three mitigating circumstances, which are factual determinations not basic to guilt or innocence, but revolving about the degree and severity of criminal culpability. *Mullaney* v. *Wilbur* (421 U.S. 684) holds that where the determination of certain facts is of crucial importance where it "may be of greater importance than the difference between guilt or innocence for many lesser crimes," the state may not lessen the standards by which those facts must be proved by "characterizing them as facts that bear solely on the extent of punishment." As noted in *United States* v. *Kramer,* 289 Fed. 2d 909, where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment", we assume "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing Judge." (*United States* v. *Kramer,* p. 921.)

CONCLUSION

For the reasons herein contained, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO,

THE STATE OF OHIO,

Appellee,

v.

HALL,

Appellant.

(No. 76-609)

On October 16, 1974, at about 10:00 p.m., Mr. and Mrs. Julius Graber returned to their Park Lane Apartment in Cincinnati from an evening of entertainment at the Music Hall. Mr. Graber drove his 1974 Chevelle Malibu to the front of the apartment building, whereupon Mrs. Graber alighted at the door and entered the building, and proceeded up to their apartment. Graber was last seen driving his automobile down toward the parking garage. About 15 minutes later, Mrs. Graber came back down from her apartment concerned about her husband's whereabouts. The doorman after conversing with her, proceeded to search the parking garage and a lot nearby. Finding neither Graber nor his vehicle, the doorman reported the same to Mrs. Graber who called the Cincinnati Police Department. An officer was dispatched arriving at the apartment at about 10:50 p. m., and after a discussion with Mrs. Graber, initiated a police broadcast for Julius Graber as a missing person.

After Graber dropped his wife off, he pulled his car into the parking garage and proceeded to his allotted space. As he pulled in, a car containing Sam Hall (appellant herein), and Willie Lee Bell stopped behind him preventing him from backing up. Hall got out of this vehicle with a .20 gauge sawed-off shotgun and approached Graber. He then ordered Graber into the trunk of his Chevelle automobile, entered the vehicle and proceeded to drive it out of the garage, Bell following in the other car. They drove to a street adjoining Hall's residence where Bell parked the other car and got behind the wheel of the Graber automobile. As they approached the Spring Grove Cemetery in the Winton Terrace area of Cincinnati, Hall directed Bell to drive into a gravelled surface lane. Bell backed the vehicle about 100 feet into this lane and stopped.

It was now approximately 10:45 p. m., and a Mr. Robert Pierce, Jr., residing in an apartment building across the street from the cemetery, arrived home from work and parked his vehicle in the front lot. His car radio was broadcasting a World Series game, and as he waited for the inning to end, he noticed the Graber vehicle with its parking lights on in the cemetery lane. He heard the sound of car doors close and turned off his radio. He turned around toward the cemetery and heard someone plead, "Don't shoot me, Don't shoot me." He then heard a shot and after a short interval, another shot. Shortly thereafter, the car drove out of the lane and after getting on Groesbeck Road, turned on its lights. Pierce called the police who responded at about 11:04 p. m., and after telling them what he had heard, they went into the cemetery. About 200 feet back, they found Graber lying with the right side of his face in a pool of blood, his right arm at his side and his left arm cocked up by his head. They immediately determined he was alive and called for the Rescue Life

Squad. The ambulance took Graber to the emergency room at General Hospital where he was pronounced dead.

The body was subsequently examined by the county coroner who attributed the cause of death to "lacerations of the brain, causing hemorrhage, due to multiple shotgun wound." A part of his left hand was also shot away, indicating that his hands were crossed behind his head at the time he was executed. Over 70 shotgun pellets were recovered from Graber's head.

Shortly after 9:00 a. m., on the next morning, October 17, 1974, a 1974 Chevelle Malibu pulled into a gas station in Dayton. Two men, Hall and Bell, were in the automobile. They inquired about road work from the attendant and left. Within 15 minutes, they returned, Hall alighting from the vehicle with a sawed-off shotgun. The attendant was ordered into the trunk of his own car, where he was relieved of the station's money. After filling the gas tank of the attendant's car, they left the station with Hall driving the attendant's car and Bell following in Graber's vehicle.

A State Highway Patrolman stopped the attendant's vehicle for a defective exhaust. Hall, immediately upon stopping, got out of the car and walked toward the patrol car announcing that there was a shotgun on the front seat of which he knew nothing. The station attendant saw the patrolman through a hole in the trunk and began pounding on the trunk. The patrolman, after getting him out of the trunk, took Hall to the Montgomery County Jail. Bell in the Chevelle returned to Cincinnati, hiding the car in a vacant building. A citizen spotted the car and reported it to the police. After being impounded, the car was dusted for fingerprints whereupon Hall's fingerprint was lifted from the passenger door.

A shotgun shell was recovered near the spot where Graber's body was found and compared with shells test fired from the shotgun taken from Hall in Dayton. An expert testified that all the shells were fired from the same gun.

While Hall was held in Dayton, he made two statements to Cincinnati police officers and one statement to a Columbus detective.

On November 22, 1974, Hall was indicted by the Hamilton County Grand Jury on two counts of aggravated murder with specifications, on one count of aggravated robbery, and on one count of kidnapping. At his arraignment he entered a plea of not guilty and counsel were appointed to represent him. Counsel immediately filed a demand for discovery pursuant to Crim. R. 16 (A), and entered an additional plea of not guilty by reason of insanity. Thereupon, the court appointed three psychiatrists to inquire into the question of Hall's sanity. The psychiatrists reported their findings accordingly. On January 13, 1975, the court found him sane and capable of standing trial. On January 14, 1975, Hall waived in writing his right to a jury trial and elected to be tried by a three-judge panel.

On January 15, 1975, Hall appeared with his counsel before a three-judge panel for trial, at which time his counsel withdrew his previously entered plea of not guilty by reason of insanity and the cause proceeded to trial. The appellant, Hall, while taking the stand on *voir dire* pursuant to a motion to suppress, did not testify at the trial.

On January 20, 1975, Hall was found guilty of the second count of aggravated murder with the specification of committing the crime while kidnapping, and of the third and fourth counts of the indictment.

A presentence examination was ordered, as was an examination by two psychiatrists pursuant to R. C. 2929.04 (B).

On March 7, 1975, a mitigation hearing was held before the same panel which unanimously concluded that there were not mitigating circumstances and sentenced Hall to die on August 20, 1975, on the charge of aggravated murder and to terms of years on the other charges.

Appeal was taken to the Court of Appeals, and that court affirmed the trial court's judgment.

The cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, and *Mr. Robert R. Hastings, Jr.*, and *Mr. Bruce Garry*, for appellee.

Mr. Clayton E. Shea, for appellant.

CELEBREZZE, J. At the outset, we can dispose of the appellant's contention that the imposition of the death penalty violates the Eighth and Fourteenth Amendments to the Constitution of the United States, in a succinct manner. Suffice to say, that this argument has been previously resolved by this court in the case of *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and that ruling has been adhered to on a number of occasions. We have carefully examined both the record in this case and the brief in support of appellant's proposition of law characterizing this complaint and we are constrained to say that we find nothing novel therein. Therefore, we shall not consider this argument further.

The appellant then contends that his statements admitted by the trial court should have been suppressed since the state did not meet its burden of establishing that he knowingly, intelligently, and voluntarily waived his *Miranda* rights. Appellant complains further that the statements were inadmissible for the reason that the prosecution did

not furnish the defense with a copy of the waiver of these rights pursuant to their motion for discovery under the Rules of Criminal Procedure.

With respect to the latter contention, the record discloses that the appellant was interviewed on three separate occasions while in custody in Dayton. The first two interviews took place on October 22, 1974, and October 23, 1974, and were conducted by detectives from the Cincinnati Police Department. On October 28, 1974, a detective from the Columbus Police Department interviewed the appellant. Pursuant to the motion for discovery filed by appellant, the prosecutor furnished defense counsel with copies of the "waiver of rights" forms executed by the appellant pertaining to the first two sessions. For whatever reasons — the prosecutor says he did not know the Columbus Police had a "waiver of rights" form for their interrogation — the prosecutor did not comply with the court's order to furnish the third waiver. The appellant maintains that without this written waiver the third statement should not have been admissible. We will not decide here the former contention, but it is obviously not a complete statement of the law.

The first two statements were tape-recorder, the former denying everything and the latter admitting participation in the kidnapping and robbery but not in the homicide. It is the third statement which the appellant characterizes as "crucial" because in this verbal statement the appellant admits his participation in the killing.

Crim. R. 16 (B) (1) (a) (i) allows discovery of statements of the defendant or co-defendant, as follows:

"(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to,

or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

"(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof * * *."

Appellant contends that the signed waiver form was evidence of a voluntary, knowing and intelligent waiver and since it was not furnished pursuant to the allowance of the discovery motion, it should have been excluded by the trial court under Crim. R. 16 (E) (3):

"If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

This exclusion, contends appellant, would have been sufficient grounds for the court to refuse the statement.

Appellee argues that the trial court properly admitted the waiver form because it could not be categorized as "information subject to disclosure." Moreover, appellee states, even if the written waiver was not subject to disclosure, it was properly received because the prosecutor did not have knowledge of its existence until just prior to the time the Columbus detective took the witness stand. Thus, the trial court in the exercise of its discretion could admit such a waiver form. Appellee states further that the appellant was not prejudiced by the admission of this document since defense counsel had already been provided with the other two waiver forms, apparently concluding that since it had complied with two-thirds of the court's order that was sufficient.

The Court of Appeals held that the form was not a "statement of defendant" under Crim. R. 16 (B) (1) (a), but arguably might be a "paper" under sub-paragraph (c) which reads:

"Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belonged to the defendant."

That court apparently accepted the prosecutor's argument that since he had no knowledge of the existence of the "paper," it was not "available to or within the possession, custody, or control of the state * * *."

We conclude that the signed waiver form constituted a "statement of defendant" within the meaning of Crim. R. 16 (B) (1) (a). Although it defies belief that an otherwise competent prosecutor would not be aware of a key document in the custody of an important state's witness, we are prepared to accept the confidence of the trial court in accepting this explanation. It should be noted, however, that the moment the prosecutor became aware of the waiver form he had a continuing duty to disclose such matter to the other party. (Crim. R. 16[D].)

The question to be determined is: "Did the trial court abuse its discretion and commit prejudicial error in admitting the waiver?" The record discloses that defense counsel had already secured two waiver forms and was on notice so as to be prepared to examine the police officers regarding their execution.

Finally, as indicated above, the interrogating officer was capable of testifying to the circumstances surrounding the obtaining of the waiver even if the document itself had been excluded. We conclude that given the totality of the circumstances, the action of the trial court, at most, constituted harmless error. (See *Chapman* v. *California* [1967], 386 U.S. 18.)

Finally, appellant contends that the state did not satisfy its burden of proving that he knowingly, intelligently and voluntarily waived his Fifth Amendment right against self-incrimination. The record discloses two incriminating statements, the one given on October 23, 1974, in which he admitted participating in the kidnapping and robbery and the other on October 28, 1974, where he confessed to participating in the murder.

The United States Supreme Court has held in the case of *Miranda* v. *Arizona* (1966), 384 U.S. 436, that the prosecution must allege and prove the following before a statement made by an accused during a custodial interrogation may be admitted in evidence:

(1) That the accused, prior to any interrogation, was given the *Miranda* warnings;

(2) After receiving said warnings, that the accused made "an express statement" that he intended to waive his rights; and

(3) That the accused effected a voluntary, knowing and intelligent waiver of his rights.

The burden is on the prosecution to prove a valid waiver under the above conditions. (*State* v. *Kassow* [1971], 28 Ohio St. 2d 141.)

Appellant contends that the totality of the circumstances indicate the waiver was not voluntary, knowing or intelligent, because he did not have the intelligence to validly waive his rights. It is the appellant's position that he did

not possess the intellectual ability to comprehend the meaning and significance of the five initial warnings given him or the mental acuity and capacity to competently decide whether to waive his rights. The facts in the record do not support this conclusion. The transcript indicates that prior to each interview by the police, the appellant was fully advised of his constitutional rights. In addition, upon all these occasions the appellant signed a "waiver of rights" form which was shown and read to him before signing. The appellant stated that he could read and each time he was read his rights he responded that he understood them. The record discloses that the appellant responded appropriately to the questions and he appeared to be calm and intelligent. According to the testimony, at no time did the appellant manifest any conduct which could be construed as a misapprehension of his rights. (*State* v. *Jones* [1974], 37 Ohio St. 2d 21.)

The record does not substantiate the appellant's contention that he did not possess sufficient mental capacity to know and understand the explanations given to him or that having understood them he did not voluntarily and knowingly waive them.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 23, 1976

No. 76-609

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

SAMUEL HALL,

Appellant,

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the execution date be set for Wednesday, February 23, 1977.

THOMAS STARZMAN,
Clerk

* * *

RECORD OF COSTS

Docket Fee .....$20.00 Paid by Clayton E. Shea

* * *

APPENDIX B

THE SUPREME COURT OF THE
STATE OF OHIO

1977 TERM

To wit: January 14, 1977

No. 76-609

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

SAMUEL HALL,

Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this ..... day of ..... 19 .....

THOMAS L. STARTZMAN, Clerk.

* * *

APPENDIX C

THE SUPREME COURT OF THE
STATE OF OHIO

1977 TERM

To wit: January 14, 1977

No. 76-609

THE STATE OF OHIO)
)
City of Cclumbus.)

STATE OF OHIO,

Appellee,

vs.

SAMUEL HALL,

Appellant.

ENTRY

(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. WILLIAM O'NEILL
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of January, 1977.

THOMAS L. STARTZMAN, Clerk,
By /s/ SAM F. JENKINS, Deputy.

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON, COUNTY, OHIO

No. C-75171

STATE OF OHIO
Plaintiff-Appellee,

vs.

SAMUEL HALL,
Defendant-Appellant.

OPINION

(Filed April 12, 1976)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr. and Bruce S. Garry, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Clayton E. Shea, 1632 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, J.

The defendant-appellant was jointly indicted with one Willie Lee Bell on two counts of aggravated murder contrary to R. C. 2903.01 with specifications of aggravated

robbery and of kidnapping, and on separate counts of aggravated robbery and of kidnapping. Counsel was assigned to the indigent Hall, and pleas of not guilty and not guilty by reason of insanity were entered. A jury trial was waived, and the case was tried, separately from that of Bell, by a three judge panel which, after determining Hall to be sane and competent to stand trial, found him guilty as charged in the second count and second specification, i.e., of aggravated murder and of aggravated murder while committing kidnapping, and of the third and fourth counts of aggravated robbery and kidnapping. Subsequently, following the penalty trial, the court found that none of the mitigating circumstances specified in R. C. 2929.04 (B) had been established by a preponderance of the evidence, and entered sentence against Hall, including the sentence of death by electrocution. It is from this judgment and sentence that appeal was timely filed.

Three assignments of error are presented for review, the third of which is phrased as follows:

> The provisions of Sections 2903.01, 2929.03 and 2929.-04, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

This assignment is sustained in large part by arguments heretofore reviewed at considerable length in the cases of *State* v. *Reaves,* No. C-75022 (1st Dist. January 26, 1976) and *State* v. *Woods,* No. C-75047 (1st Dist. January 26, 1976), and in the companion to the instant appeal, released this day, *State* v. *Bell,* No. C-75068 (1st Dist. April 12, 1976). We consider it unnecessary to review in detail our prior responses to those same arguments raised in this assignment of error, but reaffirm our determinations therein and adopt them here. It need only be added to what has

been heretofore said, that we have reviewed at length appellant's particular argument addressed to the alleged constitutional insufficiencies of the "mitigating" language of R. C. 2929.04 (B) , especially the use of the term "mental deficiency," and have concluded that the term is not so imprecise or unclear as to rob the section of that degree of certainty requisite to sustain its validity, or to permit, as appellant argues, a possible discriminatory use.

Thus, a certain amount of imprecision in vocabulary is probably inherent and unavoidable in dealing with matters relating to an incompletely developed science where, as in psychiatry and psychology, the experts continue to explore the parameters of their disciplines. The charge that appellant levels against the use of the term "mental deficiency" might, for example, be as readily used against the concepts or definitions of "sanity," or "competence" to stand trial; but it would be unthinkable, in our judgment, to abandon the effort to deal justly with these real problems simply because they require us to explore territories as yet incompletely mapped. Certainly no fair-minded person can quarrel with the legislative determination that an act which would otherwise require a death penalty should be mitigated where evidence preponderates that the offense was primarily the product or result of the offender's psychosis or mental deficiency; and where, as here, the experts to whom the courts must necessarily look for guidance in this extralegal field themselves evince no doubt or confusion with respect to the concept within which their responses are framed, the courts need not go beyond the record to search for one themselves.

Appellant's third assignment of error is overruled.

The first two assignments of error raise matters arising during the course of trial, and require us to observe, preliminarily, that the evidence here adduced at trial was, in

almost every material respect save one, that which has been reviewed at length in our opinion dealing with the appeal of Willie Lee Bell, supra. The significant variant is that in place of the statement of Bell, casting Hall in the role of planner and executioner, the instant trial contained the statement of Hall placing Bell in that leading role of mastermind of the robbery and kidnapping, and executant of the shooting of Graber. Rather than repeating the details of the events, we may therefore, and with the exception noted above, refer to our opinion in *State* v. *Bell* for the facts of the case.

The first assignment of error is phrased as follows:

> The court erred in admitting a written waiver of rights form which was not furnished to defense counsel under the Ohio Rules of Criminal Procedure.

This assignment proceeds from the following circumstance: after Hall's arrest by the state highway patrol in Dayton and the escape from the trunk of that car of the abducted gas station attendant, Hall was subjected to interrogation on several occasions by officers of several police forces. On October 22 and 23, 1974, Hall was interrogated by officers of the Cincinnati Department and was, in connection therewith, given both verbally and in writing the standard *Miranda* warnings; pursuant thereto he executed printed waiver-of-rights forms. These forms were furnished to Hall's counsel in accordance with discovery procedures. On the second of the two interrogations Hall inculpated himself in the kidnapping and armed robbery of Graber, but denied active participation in the slaying which, as noted above, he attributed to Bell. On October 28, 1974, Hall was interrogated by an officer of the Columbus Department concerning an unrelated matter, and it is the written waiver-of-rights form executed at *that* time which had

not been furnished to appellant pursuant to discovery, and to whose introduction into evidence appellant here objects. It may be noted, parenthetically, that at this latter interrogation the officer testified that Hall told him to "tell Bell in Cincinnati to keep his mouth shut and don't tell the police I shot him, and tell them I was setting on the porch." T. p. 307.

We note initially, in response to this assignment of error, some doubt that the document in question is in fact information subject to disclosure under Crim. R. 16 (B) (1). The waiver form itself, without more, would not appear to be a "*statement* of defendant or co-defendant" under subsection (a), and while it arguably might be a "paper" under subsection (c), it still must be shown to have been "available to or within the possession, custody, or control of the state, and . . . material to the preparation of [the] defense. . . ." Crim. R. 16 (B) (1) (c). Even assuming that the waiver form was otherwise discoverable, we are unable to discern in the record anything which would permit us to conclude the existence of the latter two conditions mandating its discovery.

Thus, we note the unchallenged representation of the prosecutor that the form was not, in fact, in his possession, custody, or control, or even known to him until the officer was called to testify:

> MR. PANIOTO: The case is we never knew we had those. The police had them. We never knew they had them until they just told us now that he had waived his rights.
>
> JUDGE BETTMAN: It was not furnished to defense because you did not know he had it?
>
> MR. PANIOTO: That is correct. We did not know he had it. We knew he had the statement, but not the waiver. T. p. 239.

The appellant had been informed through discovery that the Columbus officer was expected to testify, and had been furnished with the two waiver forms from the previous interrogations by Cincinnati police. Under these circumstances, we cannot conclude that the "paper," assuming it to have been such, was both available to the State and material to the defense, within the meaning of Crim. R. 16 (B) (1) (c); accordingly, we cannot conclude that the court erred in admitting the form into evidence contrary to the rule on discovery and inspection.

Appellant's first assignment of error is therefore overruled.

The final assignment of error with which we are required to deal is stated as follows:

> The Court erred in admitting the defendant's confession without first establishing that the defendant knowingly and intelligently waived his right to silence.

Appellant correctly asserts that the determination of whether a confession is voluntary and whether a waiver of rights has been made willingly and intelligently, is to be made on the basis of the totality of circumstances presented by the record. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). He is further correct in arguing that the issue of whether an effective waiver of rights is made "intelligently" depends, inter alis, upon the possession by the individual of the intellectual ability to understand the meaning and significance of the *Miranda* warnings, and the acuity to decide competently whether or not to waive those rights. Thus, we have no quarrel with the results of *Fikes* v. *Alabama,* 352 U.S. 191 (1957); *Cooper* v. *Griffin,* 455 F. 2d 1142 (5th Cir. 1972) or *U.S. ex rel Lynch* v. *Fay,* 184 F. Supp. 277 (S.D.N.Y. 1960) but rather, find them factually inapposite.

Here, the record reveals neither the oppressive atmosphere of coercion operating on a weak mind which impressed the Court in the *Fikes* case, nor the feeble-mindedness which made an intelligent waiver impossible in the *Cooper* and *Lynch* cases. It is true that while Hall is no model of intellectual capacity, he was found to have an I.Q. within low-normal, or "dull-average" range, and that his thought processes were "relevant and coherent." T. d. 19. It is perhaps useful to excerpt from the unanimous findings of the panel of psychiatrists in their report to the court pursuant to R.C. 2929.03 (D), viz.:

> Prior to seeing Mr. Hall on this occasion, we were given copies of court testimony as well as of psychological workup and psychiatric examination which were performed at Dayton, Ohio, at the Forensic Center there. Essentially, this information corroborated the earlier impressions which we had had — of an individual without psychosis, who was considered to be responsible for himself and his own actions, and was able to participate in his own trial and defense. Subsequently, we did re-examine Mr. Hall in quarters provided by the Hamilton County Jail, and noted that the patient appeared to be a well-developed and, perhaps, somewhat better nourished than on the prior occasion when we saw him. He immediately protested that he was psychiatrically ill — in contradistinction to the prior times that he was seen by us — and indicated that he wanted help with his emotional problems. He professed to be hallucinated — hearing voices and seeing visions and described this as having been present over a period of the last weeks — since his trial.
>
> Despite this, however, he appeared to be in good contact with reality and described again in fairly good detail the events of the murder and the events of the trial as he had witnessed them. It was quite evident that he felt that the threat to his own life — by electrocution — as immanent (sic), and he indicated that he had heard rumors while incarcerated about the

> severity to be expected from the present Governor of Ohio. He again repeated his desires to receive help. Generally, it was the feeling of both of us that this man did not appear to be psychotic nor mentally retarded. It was felt that the previous diagnosis was unchanged. T. d. 48.

Further, the previous diagnosis included a finding that "[h]e gives no evidence which would make one feel that he suffered a mental deficiency or derangement." T. d 19 at 3.

It is pointed out that Hall came late into the skill of reading, which appears to be true, and it is argued that this casts some doubt on his capacity to waive rights presented in written form. However, the testimony of the officers was that Hall *did* read the forms, did state that he had no questions about them, and did appear to them to understand what he read. It may also be reiterated that in each instance, the *Miranda* warnings were recited *verbally* to Hall, as well as given in writen form. T. p. 248, 286, 305, 382.

We conclude from the totality of circumstances available to us in this lengthy record that the statement was voluntary, that Hall's waiver of rights was given freely and intelligently and that, therefore, no error was committed in admitting the statement into evidence. Appellant's second assignment of error is overruled.

The judgment is accordingly affirmed.

SHANNON, P. J. and COOK, J., concur.

COOK, J. of the Eleventh Appellate District sitting by assignment in the First Appellate District of Ohio.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. B743172

STATE OF OHIO

vs.

SAMUEL HALL

FINDINGS AFTER COURT TRIAL

Entered January 20, 1975

This case came on to be heard before a Court composed of three Judges, Honorable Gilbert Bettman, Honorable Robert L. Black, Jr., Honorable Lyle W. Castle, the defendant Samuel Hall having in writing and in open court waived his right to trial by jury;

And the Court having heard and considered the evidence and arguments of counsel unanimously finds the defendant Samuel Hall guilty of aggravated murder as charged in the second count of the indictment.

The Court further unanimously finds and specifies that the offense in the second count of the indictment was committed while the said Samuel Hall was committing kidnapping, in violation of Section 2905.01 of the Ohio Revised Code.

The Court further unanimously finds the defendant Samuel Hall guilty of aggravated robbery as charged in the third count of the indictment.

The Court further unanimously finds the defendant Samuel Hall guilty of kidnapping as charged in the fourth court of the indictment.

The Court further unanimously finds that the State of Ohio has proven beyond a reasonable doubt each and every element of aggravated murder charged in the first count of the indictment but that this count constitutes an offense of similar import to that charged in the second count of the indictment and in view of the Court's findings on the second count of the indictment and in view of the Court's findings on the second count, conviction on the first count is proscribed by the provisions of Ohio Revised Code Section 2941.25. For that reason only, the Court finds the defendant not guilty of aggravated murder as charged in the first count of the indictment.

The defendant having been found not guilty as charged in the first count of the indictment the specification to the first count is rendered moot.

APPENDIX F

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

NO. B743172

STATE OF OHIO

vs.

SAMUEL HALL

SENTENCE

Entered March 19, 1975.

The Court on a prior day having found the defendant guilty of Aggravated Murder as charged in the Second Count of the Indictment and that such Murder was committed while the defendant was committing Kidnapping; and further found the defendant guilty of Aggravated Robbery as charged in the Third Count of the Indictment and of Kidnapping as charged in the Fourth Count of the Indictment and having further found that none of the mitigating circumstances listed in O.R.C. 2929.04 (B) is established by a preponderance of the evidence;

And the defendant having been brought before the Court accompanied by his counsel and inquiry being made as to whether there was any reason judgment should not be pronounced and no reason being advanced;

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Samuel Hall, on the

charge of Aggravated Robbery, be confined in the Ohio State Reformatory for a period of not less than Seven (7) Years nor more than Twenty-five (25) Years; on the charge of Kidnapping, be confined in the Ohio State Reformatory for a period of not less than Seven (7) Years nor more than Twenty-five (25) Years; such sentences to be served consecutively; and on the charge of Aggravated Murder the Defendant is remanded to the custody of the Sheriff of Hamilton County, Ohio, and within the next thirty (30) days shall be delivered by the Sheriff to the Warden of the Ohio State Penitentiary, and said Warden shall retain custody of the said Defendant until August 20, 1975, at which time the death sentence will be carried out in accordance with law.

/s/ GILBERT BETTMAN
/s/ LYLE W. CASTLE
/s/ ROBERT L. BLACK, JR.

Judges
Court of Common Pleas

APPENDIX G

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:

Term of October in the year nineteen hundred and seventy-four

HAMILTON COUNTY, ss.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that Willie Lee Bell and Samuel Hall on or about the sixteenth day of October in the year nineteen hundred and seventy-four at the County of Hamilton and State of Ohio, aforesaid, purposely cause the death of Julius Graber, while the said Willie Lee Bell and Samuel Hall were committing aggravated robbery, in violation of section 2903.01 of the Ohio Revised Code.

SECOND COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid do further present that Willie Lee Bell and Samuel Hall on or about the sixteenth day of October in the year nineteen hundred and seventy-four at the County of Hamilton and State of Ohio, aforesaid, purposely caused the death of Julius Graber, while the said Willie Lee Bell and Samuel Hall were committing Kidnapping, in violation of Section 2903.01 of the Ohio Revised Code.

THIRD COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid do further present that Willie Lee Bell and Samuel Hall on or about the sixteenth day of October in the year nineteen hundred and seventy-four at the County of Hamilton and State of Ohio, aforesaid, in committing a theft offense, inflicted serious physical harm on Julius Graber, in violation of Section 2911.01 of the Ohio Revised Code.

FOURTH COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid do further present that Willie Lee Bell and Samuel Hall on or about the sixteenth day of October in the year nineteen hunderd and seventy-four at the County of Hamilton and State of Ohio, aforesaid, by force and/or threat removed Julius Grater from the place where he was found for the purpose of facilitating the commission of a felony, and failed to release the said Julius Graber in a safe place unharmed, in violation of Section 2905.01 of the Ohio Revised Code.

SPECIFICATION TO THE FIRST COUNT

The Grand Jurors further find and specify that the offense in the first count of the indictment was committed while the said Willie Lee Bell and Samuel Hall were committing Aggravated Robbery, in violation of Section 2911.-01 of the Ohio Revised Code.

SPECIFICATION TO THE SECOND COUNT

The Grand Jurors further find and specify that the offense in the second count of the indictment was committed while the said Willie Lee Bell and Samuel Hall

were committing Kidnapping, in violation of Section 2905.01 of the Ohio Revised Code.

/s/ SIMON L. LEIS, JR.
Prosecuting Attorney
Hamilton County, Ohio

/s/ Ronald S. Panioto
Assistant Prosecuting Attorney

APPENDIX H

OHIO REVISED CODE

O.R.C. 2903.03 Voluntary manslaughter.

(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

O.R.C. 2903.04 Involuntary manslaughter.

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

O.R.C. 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose a sentence of

life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

O.R.C. 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.-01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and earlier the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

CONSTITUTION OF THE UNITED STATES AMENDMENT VIII – EXCESSIVE BAIL, FINES PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.